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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-325

NASHVILLE GAS COMPANY,
Petitioner,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, et al.,
Respondents.

BRIEF OF RESPONDENT

**In Opposition to the Petition for Writ of Certiorari
to the Supreme Court of Tennessee**

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September 29, 1977



AUTHORITIES

Page

Cases

Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688	6
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333	12
Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 92 S. Ct. 18, 32 L. Ed. 2d 369...	14
Industrial Gas Company v. Public Utilities Commission of Ohio, 135 Ohio 408, 21 N.E. 2d 166 (1939)	7
In Re: Lamkin, Texas, 355 U.S. 59, 78 S. Ct. 137, 2 L. Ed. 2d 107, rehearing denied, 355 U.S. 908, 78 S. Ct. 335, 2 L. Ed. 2d 263	13
Laclede Gas Light Company v. Public Service Commis- sion, 304 U.S. 398, 58 S. Ct. 988, 82 L. Ed. 1422....	5
Memphis Natural Gas Company v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090	6
Missouri ex rel. v. Kansas Natural Gas Co., 265 U.S. 298, 44 S. Ct. 544, 68 L. Ed. 1027	9
Panhandle Eastern Pipeline Co. v. Michigan Public Serv- ice Commission, 341 U.S. 329, 71 S. Ct. 777, 95 L. Ed. 993	11
Panhandle Eastern Pipeline Co. v. Public Service Com- mission, 332 U.S. 507, 68 S. Ct. 190, 92 L. Ed. 128..	9, 10
Radio Station WOW v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L. Ed. 2092	13

Republic Natural Gas Company v. Oklahoma, 334 U.S. 62, 68 S. Ct. 972, 92 L. Ed. 1212	4, 5
Stembridge v. State of Georgia, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130	13
Wilson v. Loew's, Inc., 355 U.S. 597, 78 S. Ct. 526, 2 L. Ed. 2d 519	13
Southern Bell Telephone & Telegraph Co. v. Tennessee Public Service Commission, 202 Tenn. 465, 304 S.W. 2d 640	12

Constitution

Article I, Section 8, United States Constitution	12
Amendment V, United States Constitution	12
Amendment XIV, United States Constitution	12
Article I, Section 8, Tennessee Constitution	12

Statutes

15 U.S.C. 717(b) (Natural Gas Act)	8
28 U.S.C. 1257(3)	4

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This is a controversy arising from a decision of the Tennessee Public Service Commission in which that Commission set just and reasonable rates for the Nashville Gas Company, a wholly-owned subsidiary of the Tennessee Natural Gas Lines, Inc.

In this Brief in Opposition, Respondent will refer to certain matters included in the Appendix to the Petition heretofore filed, with the reference being indicated as "App. p. . .".

The Tennessee Public Service Commission found, with such finding being concurred in by the Tennessee Supreme Court,

that Tennessee Natural makes sales of natural gas to, in addition to its subsidiary, Nashville Gas, three "... large industries situated in Davidson County (Nashville) and being within the area authorized to be served by the subsidiary, Nashville Gas Company, under its certificate of convenience and necessity." App. p. A-18. The Tennessee Supreme Court also recognized that:

"Tennessee Natural Gas Lines, Inc., has no operating employees. Nashville Gas Company has some three hundred and forty-two operating employees. These perform various tasks for the parent as well as the subsidiary, and the parent reimburses the subsidiary for their services. The two corporations have common officers and directors, some of the officers being wholly paid by the subsidiary and some of them being paid by the parent. The parent acquired all of the stock of the subsidiary in 1945, and has held it continuously since that time." App. p. 22.

The Tennessee Public Service Commission, in setting just and reasonable rates for Nashville Gas, attempted to consider the revenues, expenses, and investment associated with sales by its parent, Tennessee Natural, within the certificated area of Nashville Gas. Nashville Gas refused to furnish this information repeatedly throughout the proceedings below. The Supreme Court of Tennessee, in affirming the Order of the Tennessee Public Service Commission, remanded the proceeding to that Commission for the production by Nashville Gas of the information ordered by the Commission relating to the industrial sales of the parent within the service area of Nashville Gas.

It is from this Opinion of the Supreme Court of Tennessee that the petition arises.

The Tennessee Public Service Commission initially objects to the jurisdiction of this Court as the decision of the Supreme Court of the State of Tennessee, which is the subject of this

proceeding, is not a final decision, and is, therefore, not yet ripe for review here. The Supreme Court of Tennessee in its decision, at App. p. 28, stated:

"The decree of the Chancellor in this case is reversed insofar as it dealt with the parent-subsidiary relationship, and this cause will be remanded to the Chancery Court with directions to refer it to the Commission for the production by the Nashville Gas Company of the information ordered to be supplied by the Commission, and further consideration by the Commission after the information has been supplied."

The Tennessee Supreme Court in its Opinion at App. p. 19, recognized that both before the Tennessee Public Service Commission and before the lower court Nashville Gas had refused to furnish certain financial data relating to sales by its parent company within the former's certificated area. The company was ordered by the Public Service Commission at App. p. A-134, to provide such information which the Public Service Commission found necessary to the determination of just and reasonable rates for Nashville Gas, and it refused to furnish such information. The decision of the Tennessee Supreme Court merely ordered Nashville Gas to file the information which the Public Service Commission found necessary. The Tennessee Supreme Court at App. p. A-27, alludes to the complexity of the information ordered to be filed by Nashville Gas when it states:

"The Commission felt, however, that it did not have enough information about proper contracts, depreciation schedules, historical costs, and the like, to determine the extent to which the industrial sales of the parent should be taken into account in fixing appropriate rates for the subsidiary. We cannot, therefore, at this time know what significance, if any, the Commission will ultimately give to the data which it requested, but we believe that the Commission was en-

tirely justified and acting within its jurisdiction in taking these into account.”

As this Court is well aware from its consideration of utility rate matters, many complicated questions and issues can arise in determining revenues, expenses and investments of public utilities. Such will surely be the case in the instant proceeding on remand to the Tennessee Public Service Commission. An additional question will be the proper allocation of revenue, expense and investment of the parent company, Tennessee Natural Gas Lines, Inc., between that company's interstate operation as regulated by the Federal Power Commission, and its direct industrial sales not regulated by the FPC. Any or all of these questions could result in further appellate proceedings and could conceivably result in further appeal to this Court.

For these reasons, Petitioner's statement at page 2 that the jurisdiction of this Court is invoked under 28 USC 1257(3) is self-defeating in that such Code section provides for review by this Court only of final judgment on decrees rendered by the highest court of a State in which a decision could be had.

Section 1257(3) and its various predecessors—Section 237 of the Judicial Code, 28 USCA Section 344, 8 FCA Title 28, Section 344, rephrasing Section 25 of the Act of September 24, 1789, 1 Stat. 73, 85, c 20—has repeatedly been held by this Court to permit review of a final decision of the highest court of a State.

This Court, in the case of *Republic Natural Gas Company v. Oklahoma*, has stated that this requirement is:

“Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the Federal judicial system, unlike some of the states. *This prerequisite for the exercise of the appellate power is especially pertinent when a con-*

stitutional barrier against a State court's decision on matters peculiarly of local concern. Close observation of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-Federal relations.” *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 67, 68 S. Ct. 972, 92 L. Ed. 1212. (Emphasis added.)

The Court went on to review prior holdings to the effect that . . . “the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that remains to be adjudicated is the amount of damages (citing cases), “334 U.S. 68.

In a decision not dissimilar to the instant case, involving a proceeding originating with the Public Service Commission of the State of Missouri and also involving alleged confiscation by the petitioner, a gas company, this Court found that the decision of the Supreme Court of Missouri was not final when that Court affirmed a decision of the Public Service Commission, but remanded same for the determination of certain factual matters. *Laclede Gas Light Company v. Public Service Commission*, 304 U.S. 398, 58 S. Ct. 988, 82 L. Ed. 1422. The Court in *Laclede* quoted with approval from the response of the Public Service Commission: “From the very nature of the various items remanded for rehearing, it is conceivable that the Commission may reach conclusions which would constitute the basis of another appeal.” *Laclede Gas Light Company, supra*, 304 U.S. at 400.

As this Court recognized in *Laclede, supra*, the Tennessee Public Service Commission in the instant case may, in its consideration of the financial data ordered to be furnished to it, make findings of fact and conclusions of law, which would them-

selves be open to judicial review and would conceivably result in piecemeal appellate review of the proceeding which this Court has repeatedly refused to allow.

This Court in the case of *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688, has stated that the policy against premature constitutional adjudication demands that any doubts in maintaining this burden (of jurisdiction) be resolved against jurisdiction.

This Court has also stated "Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction." *Memphis Natural Gas Company v. Beeler*, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090.

It is respectfully asserted that in the instant proceeding, the Appellant does not, as indeed it cannot, carry its burden of affirmatively establishing this Court's jurisdiction, because the decision of the Tennessee Supreme Court by its own terms is not a final decision, and as such cannot be properly before this Court for review.

There are many misstatements of fact and misconstructions of findings in the proceedings below contained in the petition herein to which the Tennessee Public Service Commission must respond.

Simply stated, the Petitioner herein was found by the Tennessee Supreme Court to be "... nothing more than an operating division of the parent (Tennessee Natural Gas Lines, Inc.)." App. p. 26. The Tennessee Public Service Commission specifically found in its Order that Tennessee Natural Gas Lines, Inc., was serving three large industrial customers located within the certificated area of the Nashville Gas Company, its subsidiary. App. p. 128. During the proceedings Nashville Gas refused to furnish information which the Commission found to be

necessary in determining the revenues lost to Nashville Gas as a result of these sales by its parent within Nashville's certificated area. The Commission stated:

"We believe this information is material and necessary if we are to meet our statutory responsibility of setting just and reasonable rates for Nashville Gas Company. It is our position that the Nashville Gas Company should have acted toward its parent as it would have to an outside company when the decision was made by Tennessee Natural Lines to serve these three customers located within the certificated area of Nashville Gas. A policy of selecting profitable customers by the parent and less profitable customers by Nashville Gas Company cannot result in the setting of just and reasonable rates for Nashville Gas Company *unless* and *until* the Commission has sufficient information to determine what rates would be required by Nashville Gas Company if it, instead of its parent, were serving these three customers." App. p. 132.

The Tennessee Supreme Court recognized the concern expressed by the Public Service Commission when it stated:

"Management decisions, for legitimate reasons, may have placed the industrial sales and the facilities requisite therefor in the parent company, but this does not prevent a public regulatory body from considering them as part of an operating system in taking them into account in determining the proper rate base and rate structure of the subsidiary. Otherwise, it would be a simple matter, through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent, or an affiliate, or a subsidiary, of its most profitable customers. See *Industrial Gas Company v. The Public Utility Commission of Ohio*, 135 Ohio 408, 21 N.E. 2d 166 (1939)."

In the procedural history section of the petition at page 9, Petitioner incorrectly paraphrases ordering paragraph three of the Order of the Tennessee Public Service Commission. As indicated at App. p. 135, the Commission ordered:

"4. That the Nashville Gas Company is hereby ordered to file with this Commission a proposed tariff which will produce additional annual revenues not to exceed \$1,144,000 less the effect of impugning to Nashville Gas Company the revenues, expenses, and investments associated with the sales to the three industrial customers, within Nashville Gas Company's certificated area."

Contrary to the paraphrase of Petitioner at page 9, the Tennessee Public Service Commission does not, nor has it ever recognized that the revenues from sales to the direct industrial customers of Tennessee Natural Gas Lines, Inc., are subject to regulation by the Federal Power Commission.

The Petitioner alleges that the decision of the Tennessee Supreme Court is in conflict with the Natural Gas Act and the jurisdiction of the Federal Power Commission (FPC). Ironically, Petitioner at page 3 quotes Section 1(b) of the Natural Gas Act (15 USC 717(b)) which provides:

"Provisions of this Act which apply to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, shall not apply to any further transportation or sale of natural gas, or to the local distribution of natural gas or to the facilities used for such distribution, or to the production or gathering of natural gas."

The direct industrial sales of Tennessee Natural, not being for resale but for the ultimate consumption of the industrial pur-

chasers, are specifically exempted from Federal regulation by the above provision of the Act and have specifically been held by this Court to be subject to State regulation.

In often-quoted language this Court has recognized the jurisdictional character of industrial sales by interstate pipeline companies as follows:

"The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount and the interference with interstate commerce, if any, is indirect and of minor importance." *Missouri ex rel. v. Kansas Natural Gas Company*, 265 U.S. 298 at 309, 44 S. Ct. 544, 68 L. Ed. 1027.

This Court has also recognized that comprehensive and effective dual regulation of the natural gas industry between Federal and State jurisdictions as being the governing legal principle since the passage of the Natural Gas Act in 1938. This partnership was expressed as follows in a 1947 decision of this Court:

"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. (Case citations omitted.) And, as we pointed out in *Federal Power Commission v. Hope Natural Gas Co.*, supra (320 U.S. at 610, 88 L. Ed. 349, 64 S. Ct. 281), the 'primary aim of this

legislation was to protect consumers against exploitation at the hands of natural gas companies.' The scheme was one of cooperative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, *if those companies could divert at will all or the cream of their business to unregulated industrial uses.*" (Emphasis added.)

Panhandle E. Pipeline Co. v. Public Service Commission, 332 U.S. 507, 520, 68 S.Ct. 190, 92 L. Ed. 128.

This Court recognized that effective dual regulation would be unsuccessful if pipeline companies could skim the cream off of a distribution company's certificated area by serving the large industrial customers at unregulated rates. In footnote 19 to *Panhandle Eastern Pipeline Co. v. Public Service Commission*, *supra*, 332 U.S. at 521, this Court stated:

"Over 38 percent of the gross revenue of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. *The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.*" (Emphasis added)

In 1974, Tennessee Natural sold its three industrial customers 10.1 billion cubic feet; Nashville Gas sold its customers 20.9 billion cubic feet, or a system total of 31 billion cubic feet. The industrial customers represent 33 percent of the system sales which is of the same magnitude as the 38 percent referred to in *Panhandle, supra*. Tennessee Natural, through the

use of its corporate device, has skimmed the cream from the Nashville Gas certificated area by serving three large industrial customers at heretofore unregulated rates, and is here attempting to persuade this Court to alter its long-standing policy of effective dual State-Federal regulation.

In a later decision, this Court also recognized that rates to the customers of distribution companies (such as Nashville Gas) would be adversely affected by pipeline companies serving large industrial customers with unregulated rates:

"Appellant (Panhandle Eastern Pipeline Company) asserts a right to compete for the cream of the volume without regard to the local public convenience or necessity. Were Appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's over-all costs of service and its rates to customers whose only source of supply is Consolidated. *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 at 334, 71 S. Ct. 777, 95 L. Ed. 993.

Tennessee Natural had no regard for public convenience and necessity when it began serving customers in the certificated area of its subsidiary, Nashville Gas. It is also clearly understandable why Nashville Gas did not complain about such encroachment as did the Consolidated Company in *Panhandle, supra*. This record is abundantly clear that Nashville Gas and Tennessee Natural are operated as one entity with the customers of Nashville Gas suffering from the skimming of the cream of the business by the parent. The action of the Tennessee Public Service Commission, as affirmed by the Tennessee Supreme Court, will correct this inequity, and will do so in a manner that is not only fair to the customers of Nashville Gas, but also the shareholders of the consolidated Tennessee Natural—Nashville Gas system.

The Tennessee Public Service Commission must, under numerous decisions of this Court and the Supreme Court of Ten-

nessee, set rates that are just and reasonable and which produce a fair rate of return to the utility owners. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 64 S.C. 281, 88 L. Ed. 333; *Southern Bell Telephone and Telegraph Company v. Tennessee Public Service Commission, et al.*, 202 Tenn. 465, 304 S.W. 2d 640. If, after this case is considered on remand by the Tennessee Public Service Commission, Nashville Gas feels that its properties are being confiscated, remedies are available to it in the courts of Tennessee under the Constitution of Tennessee, Article I, Section 8, as well as to this Court, under the U.S. Constitution, Article I, Section 8, and Amendments V and XIV.

Throughout its petition, Petitioner repeatedly refers to the subsidization which would result from the implementation of the Order of the Tennessee Public Service Commission, as affirmed by the Tennessee Supreme Court. There will be no subsidization in any form. The ratepayers of the Nashville Gas Company as a result of the Order of the Tennessee Public Service Commission, as affirmed by the Tennessee Supreme Court, will for the first time receive the benefits to which they have been justly entitled since Nashville Gas initially allowed its parent company to enter its certificated area and assume gas service to the most profitable customers within that certificated area.

The entire nexus of this proceeding is to give the benefit of net revenues derived from the industrial sales of the parent company within the certificated area of the subsidiary to the ratepayers of the subsidiary who are entitled to such benefits. As has been stated repeatedly in the proceedings below, to require the Tennessee Commission to regulate the rates charged by Tennessee Natural to its industrial customers directly (even Petitioner herein recognizes this right at page 12 of its petition) would ignore the overriding factual determination in the instant case that the parent's industrial sales are, and have been since their inception, conducted within the certificated area of the

subsidiary. Another and entirely different question would arise if the parent's industrial sales occurred in an area physically removed from the certificated area of the subsidiary. But such is simply not the case in the present situation and the methodology of regulation adopted by the Tennessee Public Service Commission, and affirmed by the Tennessee Supreme Court, is entirely appropriate and is in no manner violative of any Federal statutory or constitutional provisions.

This matter was initially decided by the Tennessee Public Service Commission based upon the unique facts of this case, which are discussed at length in its Order and as have been partially reiterated hereinbefore, and was affirmed by the Supreme Court of the State of Tennessee, upon the facts which were discussed adequately and fully in its Opinion.

This Court has historically refused to review judgment of State Supreme Courts where there are adequate State grounds for the decision of the State court. *Wilson v. Loews, Inc.*, 355 U.S. 597, 78 S. Ct. 526, 2 L. Ed. 2d 519, *In re: Lamkin, Texas*, 355 U.S. 59, 78 S. Ct. 137, 2 L. Ed. 2d 107, rehearing denied, 355 U.S. 908, 78 S. Ct. 335, 2 L. Ed. 263. Clearly there is a factual basis for the decision of the Tennessee Public Service Commission, as affirmed by the Tennessee Supreme Court, independent of any Federal question.

Even assuming that the question of the existence of adequate State grounds for the decision of the Tennessee Supreme Court is debatable, this Court is without jurisdiction to review such judgment. *Stembridge v. State of Georgia*, 343 U.S. 541, 72 S. Ct. 834, 96 L. Ed. 1130. Even further, this Court has held that it will not review a State court decision resting on an adequate and independent non-Federal ground although the decision also rests on an erroneous view of Federal law. *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092.

Respondents herein do not admit that the determination of the Tennessee Public Service Commission as affirmed by the Tennessee Supreme Court is debatable or is in any manner erroneous. Respondents aver that the decisions below are fully supported by the facts contained therein, and are fully supported by the law of the State of Tennessee, as determined by its supreme judicial court absent any determination of Federal statutes or rights.

Neither the Tennessee Commission nor the Supreme Court of Tennessee has attempted to encroach upon the authority of the Federal Power Commission, as determined by the Natural Gas Act, nor as interpreted by the decision of this Court. Respondent cites the case of *Federal Power Commission v. Louisiana Power & Light Company*, 406 U.S. 621, 92 S. Ct. 18, 27, 32 L. Ed. 2d 369, which reaffirms the rate jurisdiction of State regulatory commissions and reaffirms the transportation jurisdiction of the Federal Power Commission. The present case does nothing more than follow the mandate of this Court in *Louisiana Power and Light*, and in no manner enlarges upon same nor conflicts with same. The action of the Tennessee Public Service Commission herein complained of in no manner affected that portion of the operation of Tennessee Natural regulated by the Federal Power Commission, but is solely and simply confined to the unregulated rates and resulting revenues to Tennessee Natural which accrue from its sales resulting from its encroachment and infringement upon the certificated area of its subsidiary, the Nashville Gas Company.

CONCLUSION

As is readily apparent from the Order of the Tennessee Public Service Commission (App. p. A-87) and the Opinion of the Supreme Court of Tennessee (App. p. A-17), the facts of the instant proceeding are unique and most likely will not apply in

any other situation in the United States. If the decision of the Tennessee Supreme Court stands, it will have no effect or impact whatsoever upon the conduct of interstate commerce. It will only serve to give to the customers of the Nashville Gas Company the benefit of sales of natural gas to industrial customers within the certificated area of that company which the initial trier fact, the Tennessee Public Service Commission, determined should have been made by Nashville Gas.

Wherefore, for the reasons heretofore shown, the petition for Writ of Certiorari of the Nashville Gas Company should be denied and/or dismissed.

Respectfully submitted,

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September 29, 1977

Certificate of Service

I hereby certify that I have this day served the attached Brief of the Tennessee Public Service Commission upon all parties required to be served by mailing three copies of same, postage prepaid, to Counsel for the Nashville Gas Company in Washington and Nashville, and Counsel for all other parties before the Supreme Court of Tennessee, addressed as follows:

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